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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

EMIGDIO GUZMAN OJEDA,

Defendant and Appellant.

F069236

(Super. Ct. No. VCF255918)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Michael A. Canzoneri, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Kane, Acting P.J., Franson, J., and Smith, J.

Emigdio Guzman Ojeda was convicted of second degree murder in the shooting death of his former wife, Flor Sanchez. Ojeda admitted the shooting occurred but claimed Sanchez was shot accidentally three times while the two struggled over the gun. According to Ojeda, Sanchez was attempting to prevent him from committing suicide.

Ojeda argues the judgment must be reversed because of improper comments by the prosecutor and the trial court about his postarrest silence. We will affirm the judgment concluding that, even if error occurred, Ojeda did not suffer any prejudice.

FACTS AND PROCEDURAL HISTORY

The information

The information charged Ojeda with the murder of Sanchez (Pen. Code, § 187, subd. (a)) and charged numerous firearm enhancements (§ 12022.5, subds. (a), (d); § 1192.7, subd. (c)(8); § 12022.53, subds. (b), (c) & (d)). In addition, the information charged Ojeda with misdemeanor possession of a firearm when prohibited from doing so (§ 12021, subd. (g)(2)), misdemeanor disobeying a domestic relations court order (§ 273.6, subd. (a)), and misdemeanor resisting/obstructing a police officer (§ 148, subd. (a)(1)).

Prosecution evidence

Peter Garza was Sanchez's son. On the day in question, he was watching his cousin play video games when another cousin yelled that Sanchez had returned from the grocery store. As Garza walked to the front door to help bring the groceries into the house, he heard his mother yell and then heard gun shots. Garza grabbed a knife from the kitchen, ran out the front door, and charged at Ojeda. He tried to stab Ojeda with the knife, and when he dropped the knife, he struggled with Ojeda. Garza eventually let go of Ojeda to tend to his mother.

Garza explained that, when he first saw his mother, she had grocery bags in her hands. He saw her as he was walking toward the front door. He could see through the living room window that Ojeda was standing in the front yard. The next thing Garza

heard were three gunshots. Garza saw his mother when she was shot, and Ojeda was not standing with her. As Garza exited the house, it appeared Ojeda was attempting to leave the area. Sanchez was lying on the ground near the porch. Garza ran straight to Ojeda to confront him. As Garza was struggling with Ojeda, he asked Ojeda why he shot his mother. Ojeda told Garza to call the police, said that he wanted to die, and tried to explain himself by saying that Sanchez had cheated on him.

Other witnesses explained that, after the shooting, Ojeda walked across the street and drove to his house where a SWAT team arrested him. A search of Ojeda's house after the arrest discovered a binder on the kitchen table with what appeared to be apology notes to various individuals, bills that needed to be paid, bank statements, and photographs. Other notes with instructions, including life insurance policies, were also found inside the house. In one bedroom there was writing on the wall which said, "Till death do we part."

The autopsy revealed there were four wounds caused by three bullets. One was an entrance wound to the left chest from which a bullet was recovered. There was no powder tattooing or stippling to the entrance wound, indicating that this was not a contact or near-contact wound. The gun could have been as close as inches away from the victim. The bullet traveled through the heart and lung.

Another wound was on the back of Sanchez's right hand. The bullet appeared to fragment, and a portion of the bullet exited near the wrist causing a third wound. There was no powder tattooing, burns, or stippling to these wounds, meaning they were not contact or near-contact wounds.

The fourth wound was to the head. The slug penetrated the skin, but did not penetrate the skull, similar to a graze-type wound. There was not any stippling or powder burns.

Cause of death was exsanguination from the gunshot wound to the chest.

After Ojeda returned to his home, he called the emergency operator. The phone call continued until Ojeda was arrested. Silver Rodriguez, who was a Porterville Police Captain at the time, was one of three individuals who spoke with Ojeda during the call. A recording of the conversation was played for the jury.

The prosecution presented evidence of two prior incidents of domestic violence pursuant to Evidence Code section 1109. Gina Duran testified she was living across the street from Sanchez on the day of the shooting. She had been involved with Ojeda approximately 20 years prior. In 1991, after she broke up with Ojeda, he followed her to a night club and threw a rock at the truck in which she was riding. On two occasions within a month of the shooting, Duran observed Ojeda hide behind trash cans and look through the windows of Sanchez's home.

Porterville Police Department Detective Manuel Franco testified that in March 2011 (five months before the killing), he was dispatched to a location where he encountered Sanchez. The two rear tires of her vehicle were flat and looked as if they had been slashed. Franco later contacted Ojeda who admitted he slashed her tires with a knife. Ojeda claimed he did this because he had paid for the tires and Sanchez would not reimburse him. The court issued an emergency protective order, which Franco provided to and explained to Ojeda. When he was detained, Ojeda told another officer he had slashed the tires because he was jealous.

Defense evidence

Two witnesses testified during the defense case. The first was Ojeda. He explained that, about two to three months before he killed Sanchez, he had stopped working in his lawn care business because he was depressed as a result of the failure of his attempts to reunite with Sanchez. In essence, he felt Sanchez was leading him on by spending time with him and encouraging him to take various steps so they could reunite, but she refused to reenter a full-time relationship with him. He testified that one day

Sanchez would talk to him but the next day she would not. He claimed he just wanted Sanchez to leave him alone.

On the day of the killing, Sanchez came by his house in the morning to check on him. When Ojeda told Sanchez he had not eaten in several days, she invited him to her house for a meal around lunch time.

After Sanchez left, Ojeda returned to his bed and cried. At the appropriate time, he got up and went to Sanchez's home. Before he left, Ojeda took several pills and drank half a bottle of wine. He then drove to Sanchez's home. He took his gun with him because he had "decided already I was tired of her playing with my mind and I was going to end my life right there at her house that day." He was going to shoot himself at Sanchez's house so the house would be haunted by spirits, and he wanted Sanchez to be haunted.

When he arrived at the house, he sat on a small fence and cried while waiting for Sanchez to return home. Sanchez waived at Ojeda and then began unloading groceries from the trunk of her vehicle. When Sanchez asked Ojeda why he was crying, he replied that he had lost everything so he was going to commit suicide. Sanchez said no and started yelling for her son. Ojeda pulled the gun out of his waistband and aimed it at his neck but nothing happened when he pulled the trigger. Sanchez tried to grab the gun from Ojeda and the two struggled. During the struggle, the gun went off three times, each time striking Sanchez. Ojeda never let go of the gun because he wanted to shoot himself. When Garza attacked Ojeda with the knife, Ojeda said "I am sorry this wasn't supposed to happen." Ojeda told Garza to call for an ambulance and then fled the area so he would not cause any more problems. Ojeda opined that the firearm did not initially fire because the safety was activated, but he believed he deactivated the safety either just before the struggle with Sanchez or during the struggle.

When Ojeda arrived at his house, he took more pills hoping to die. He heard the police arrive and eventually called the emergency operator. Ojeda could not remember

what he said during this conversation. He remembered walking outside and the dog attacking him. His next memories were when he woke up in jail. Ojeda stated he left his personal items and papers on the kitchen table because he intended to kill himself.

On cross-examination, Ojeda admitted slashing Sanchez's tires and admitted he was served with a protective order but claimed the two still planned on getting back together in the future. He denied throwing rocks at Duran's vehicle, instead claiming that Duran's male companion threw a rock at his vehicle. He also claimed that Duran had a motive to fabricate testimony against him because, shortly before Sanchez's killing, Ojeda had asked Duran to move from the house where she lived, which Ojeda apparently owned, because Sanchez was uncomfortable living so close to Duran.

The second witness was Alan B. Barbour. He is a forensic toxicologist and testified the blood tests performed at the hospital after the shooting indicated that Ojeda had high levels of various drugs in his system.

The jury found Ojeda not guilty of first degree murder but guilty of the lesser offense of second degree murder. It also found true the firearm enhancements. Ojeda was found guilty of two of the misdemeanor charges, but the jury could not reach a verdict on the resisting-arrest count, which was eventually dismissed. The trial court sentenced Ojeda to the statutorily mandated term of 15 years to life, enhanced by a term of 25 years to life because he used a firearm, for a total sentence of 40 years to life.

DISCUSSION

The only issue is whether prejudicial error occurred pursuant to the principles established in *Doyle v. Ohio* (1976) 426 U.S. 610.¹ Doyle and his codefendant Wood were convicted of selling marijuana to a police informant. They were arrested after the transaction occurred and given warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S.

¹Ojeda frames his argument as ineffective assistance of counsel. For clarity, we will address the issue directly as the same result would be reached regardless of the approach taken.

436. Apparently neither of the defendants in *Doyle* answered any of the questions posed by the police.

In separate trials, both of the defendants testified the police informant's testimony was false. What actually occurred, according to the defendants, was the informant attempted to sell marijuana to the defendants. On the way to complete the transaction, Doyle decided he only wanted to purchase a fraction of the agreed-upon amount. Doyle informed the informant he had changed his mind when they met to complete the transaction. The informant became angry, threw money into Doyle's vehicle, and drove away with the marijuana.

Neither of the defendants ever told anyone associated with law enforcement this version of the events before trial. During cross-examination, the prosecutor repeatedly confronted the defendants with this fact. The defendants appealed, and the Supreme Court concluded *Miranda* required reversal. "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. [Citation.] Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Doyle v. Ohio, supra*, 426 U.S. at pp. 617-618, fns. omitted.)

Ojeda alleges the prosecutor violated *Doyle* by asking on cross-examination if he had ever explained to the police that Sanchez was shot accidentally. In addition, Ojeda asserts comments by the trial court compounded the error. The relevant proceedings occurred during the cross-examination of Ojeda, the prosecutor's closing argument, and in response to a question posed by the jury.

During cross-examination, the prosecutor pointed out that Ojeda left after he shot Sanchez instead of waiting to talk to the police. The following then took place:

“[Prosecutor:] You didn’t stick around to explain to the police this was a horrible accident, I never meant for her to get shot, correct?”

“[Ojeda:] No, I didn’t.

“[Prosecutor:] In fact the first time you are ever telling anybody that this was an accident was here in open court today, correct?”

“[Ojeda:] Well—

“[Prosecutor:] Let me rephrase my question. You never before today in open court told a police officer, a detective, a DA investigator, a Judge, anybody that this was an accident, correct?”

“[Defense Counsel:] I would object to this. Talking to the DA investigator, judge, I mean that is inappropriate people he could talk to.

“THE COURT: I am going to allow the question that he didn’t stick around and tell anybody that it was an accident. I am going to allow that. But getting into specifics as far as law enforcement—well I am going to allow it because he was Mirandized and he did make a statement to law enforcement.

“[Defense Counsel:] My objection was to specifically the judge, DA, investigator.

“THE COURT: Okay. But he was interviewed by law enforcement. He did make a 911 call and so there were opportunities for him to say that and I will allow that examination. But regarding telling the judge, he has already got an attorney, so Miranda, he is not allowed to talk to anybody. But in those instances where he is allowed to talk to somebody and the fact that he didn’t I am allowing that. Do you understand what I just said?

“[Prosecutor:] I believe so.

“[Prosecutor:] When you, let me word this correctly. You didn’t stick around and tell police at the scene what happened, correct?”

“[Ojeda:] Correct.

“[Prosecutor:] And you never told law enforcement that this was an accident, correct?”

“[Ojeda:] I don’t believe I did.”

The prosecutor then asked if Ojeda told the emergency operator the shooting was an accident, but Ojeda claimed a lack of memory.

During her closing argument, the prosecutor argued there was no evidence to support Ojeda’s claim of an accident, and that the physical evidence was not consistent with an accidental shooting. She then commented, “[t]here was just no accident. All of the evidence points that he had this thing planned out and nothing supports his argument that this was an accident except his self serving statement that he mentioned for the first time ever on the stand today.” Defense counsel did not object to this statement, and the prosecutor did not make any further reference in closing or rebuttal argument to Ojeda’s trial testimony being presented for the first time at trial.

The third incident occurred during jury deliberations when the jury sent a request to the trial court (1) for a read back of the testimony of the children who were at home when the shooting occurred, (2) to see the firearm, (3) to listen to Ojeda’s call to the emergency operator, and (4) to see the “police reports of defendant[’s] interview.” The trial court responded by informing the jury the court reporter would read back any part or all of the testimony of the children as requested by the jury, the bailiff would bring the gun in for the jury to view, and the jury could listen to the recording of Ojeda’s call to the emergency operator.

The trial court’s response to the request for the police report is where the claimed error occurred. Initially, the trial court told the jury it could not see the police report because it was not entered into evidence. The trial court then expanded on its answer:

“THE COURT: [¶] ... [¶] There was no interview of the defendant unless you want the interview regarding the slashing the tires case, but he wasn’t interviewed. The only testimony you have from the defendant is what he testified to up here and what’s on the 911 tape, that’s all.

“JUROR #7: To clarify, related to the police reports then there is no interview of the defendant?

“THE COURT: No.

“JUROR #7: Okay.

“THE COURT: He didn’t want to talk to them.

“JUROR #7: Okay.

“THE COURT: Which is his right. And so what you have is his testimony and what’s on the 911 tape or disk.”

The trial judge was required to leave the courthouse shortly thereafter. The attorneys, however, were uncomfortable with the above colloquy, so Judge Papadakis was brought in to address the issue. After discussing the matter with the attorneys, the jury was brought back into the courtroom and provided with an additional explanation:

“An issue has arisen that we feel appropriate to give you an explanation on and in order not to delay your deliberations until we find out when Judge Ferguson will be able to return, I have spoken with the attorneys and I hope I can clear this issue up for you.

“There was apparently a request from the jury for a police report that might have been some reference to during your trial. The police report is not in evidence and I believe Judge Ferguson has told you it is not in evidence, so you don’t consider it.

“I was further informed that the reason for that request was there was a possible statement of the defendant in that police report. That also is not in evidence, obviously as part of that. I need to inform you that whether or not a statement was made or any reason for such is not in evidence so whether or not a statement is made or whatever reason for making it or not making it is not to be considered by you, by the jury for any purpose. Does that clarify it? All right. Hopefully you can get back to your deliberations and we don’t have to delay you. ”

Defense counsel moved the trial court for a mistrial based on the trial court’s comments about defendant’s failure to give a statement to the police. Defense counsel argued the error could not be cured and a mistrial was required. The trial court denied the motion.

From these facts, Ojeda argues *Doyle* error occurred. We are not certain there was *Doyle* error. This is not as clear a case as *Doyle* because Ojeda did talk to the police after he shot Sanchez but before he was arrested. When Ojeda called the emergency operator, he eventually spoke with Captain Silver Rodriguez. When the SWAT team arrived at Ojeda's house for the arrest, the phone call was transferred to Sergeant Jay Costello. Because there were conversations between Ojeda and police officers wherein Ojeda had the opportunity to explain that the shooting was accidental, and Ojeda never gave such an explanation, these conversations were proper areas of inquiry by the prosecutor both during the cross-examination of Ojeda and during closing argument.

However, the prosecutor's questions and comments were not as focused as they could have been. Had she made it clear she was limiting her questions and comments to the conversations that occurred before Ojeda was arrested, then this issue would have absolutely no merit. Because she did not, it is arguable whether *Doyle* error occurred.

The trial court's comments and ruling were, for the most part, correct; however, the court could also have been more clear when speaking to the jury by informing them there was no evidence that Ojeda was interviewed by the police after he was arrested, and the jury could not consider that issue for any purpose. The trial court was correct that the fact Ojeda left the scene without telling anyone the shooting was an accident was a proper area of inquiry, and, as stated above, that the prosecutor could inquire about Ojeda's failure to explain the shooting was an accident when he spoke to the police before he was arrested.

We need not decide if *Doyle* error occurred, however, because, even if error occurred, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) We begin our analysis by once again acknowledging this was not a case like *Doyle* where there was no evidence before the jury that the defendant had spoken to police officers at any time before trial. Ojeda spoke with two officers before he was arrested, and his failure to inform them in these conversations that the shooting

was accidental was very relevant. Accordingly, the prosecutor's attempts to inquire into this area were proper. Moreover, the trial court explained to the jury that it was Ojeda's right to refuse to speak to the police after he was arrested, and the jury was instructed by Judge Papadakis that it was not to consider for any reason the fact that Ojeda did not give a statement to the police. For all of these reasons, the discussions about Ojeda's failure to explain his accident theory was much less harmful than it might otherwise have been.

However, the primary reason for finding Ojeda did not suffer any prejudice is that the evidence against him was overwhelming. Garza, who was as close an eyewitness to the shooting as there was, did not observe a struggle between Ojeda and Sanchez before Sanchez was shot. The lack of any stippling around the wounds suffered by Sanchez strongly suggests the shots were not fired from close range. Ojeda's flight and failure to explain to anyone that the shooting was accidental also are strong indications that the shooting was not accidental. The statement Ojeda wrote on the wall of his house, "Till death do we part," is again an indication that he intended to, and did, kill Sanchez. Ojeda's testimony that the gun failed to fire twice when he attempted to shoot himself was simply unbelievable. According to Ojeda, the first time he tried to shoot himself, the safety was on, but he was able to disable the safety when Sanchez began struggling with him. If Ojeda's intent was to commit suicide, one would expect he would not disable the safety when Sanchez began struggling for the gun. Moreover, his claim that after he successfully fired at least three shots at Sanchez the gun jammed when he tried to shoot himself could reasonably be interpreted by a jury as fabrication, rendering his testimony much less credible.

The most compelling evidence of Ojeda's guilt, however, came from his own mouth during his conversations with the emergency operator, Captain Rodriguez, and Sergeant Costello.

When he first called the emergency operator, Ojeda informed the operator there were police at his house. When the operator asked what happened, Ojeda responded, "I

just shot my ex-wife.” He did not say he accidentally shot Sanchez. Ojeda then stated “I have a gun to my head. Uh, my wife cheated on me. I forgave her. She said she would come back to me. She never did. I went into depression. I tried to overdose. I love her too much, I can’t live in this world anymore. I took like 50 pills of prescription medication, 30 minutes ago. I have a gun to my head. I don’t wanna kill anyone innocent. I just want them to kill me, ‘cause I don’t wanna hurt anyone innocent.” When asked what medication he took, Ojeda said he took everything he could find, asked the police to do him a favor and kill him, and said “I won’t hold it against nobody. I just don’t wanna kill anyone that was an innocent. No one that broke my heart. I tried to do everything with my wife. [¶] ... [¶] And she betrayed me with another guy. But I can’t live, I lost my home, I lost my business. I just don’t want to live in this hell anymore.”

At this point, Rodriguez began speaking with Ojeda. The beginning of this conversation reflects Rodriguez’s attempt to obtain information from Ojeda about his current circumstances, and to assure Ojeda that the police did not want to shoot him. When Rodriguez asked Ojeda how the standoff could be ended peacefully, the following occurred:

“[Ojeda]: I want my wife to take me back, she still loves me.

“[Rodriguez]: I know but you can’t right now, you can’t do that, did you hurt her?

“[Ojeda]: I think I shot her.”

Rodriguez kept talking to Ojeda, spending most of the time trying to calm him and assuring him the police wanted the standoff to end peacefully. Ojeda kept repeating he wanted to die. As he was talking to Ojeda, Rodriguez asked Ojeda where he shot Sanchez. Ojeda replied, “I don’t know, I thought I shot her in the stomach.” Rodriguez then asked why Ojeda shot Sanchez. Ojeda said they were trying to work out their problems. Rodriguez commented that shooting Sanchez in the stomach would not help to

work out any problems they may have had. Rodriguez kept talking to Ojeda, again trying to keep him calm.

At this point, Rodriguez transferred the call to Costello. Costello began by asking Ojeda what was happening. Ojeda replied he was depressed, hadn't eaten for days, couldn't live without Sanchez, and wanted to die. Costello assured Ojeda the police wanted to keep him alive. Ojeda continued with his explanation:

“She told me she loves me and she just needed time to get over the hurt and then she backstabbed me, she started dating some other [guys] she told me she wants nothing to do with me, and you know, I did everything she told me to do, I went in counseling, I quit doing all the bad things for her, for six months, and I was just really hurt, betrayed. [¶] ... [¶] I just can't live without her. [¶] ... [¶] That's pretty much, I just, I just can't live every day without her unless I'm drugged or drunk, I sleep all day, I sleep all night, I lost my business, I had a good lawn service, and now nothing cared, nothing I care about is being with her and being happy again.”

While Costello was trying to talk Ojeda into walking out of the house, Ojeda asked about Sanchez. Ojeda then said he wanted to talk to her, but Costello said he did not know where she was. Ojeda replied, “I want to tell her I'm sorry, I'm just not [in] control, of what she told me and, I just love her so much, that I can't live without” After more conversation, Ojeda finally surrendered to the police.

These are the relevant passages of the call made by Ojeda to the emergency operator. He never suggested the shooting was an accident, instead admitting he shot Sanchez because she would not reconcile with him and, in his view, she had cheated on him. While acknowledging that Ojeda had taken an excessive amount of medication before the phone call, the entire transcript reveals he was coherent enough to understand what he had done and what was going on at the time. The fact Ojeda never suggested to anyone that Sanchez was accidentally shot when they struggled over the gun and his admission that he shot her is very compelling evidence the shooting was not accidental.

The testimony of the independent witnesses, the physical evidence, the call to the emergency operator, and Ojeda's own testimony each provides persuasive evidence that Ojeda was guilty of killing Sanchez. When taken together, the evidence of Ojeda's guilt is overwhelming. Accordingly, we conclude that if *Doyle* error occurred, the error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.